- If a Settling Work Defendant appeals EPA's decision
- 2 pursuant to Subpart C of Section XX (Dispute Resolution) and
- 3 prevails upon final resolution of the dispute, no stipulated
- 4 penalties or interest thereon will be payable and any assessment
- 5 of stipulated penalties and interest thereon shall be set aside
- 6 in writing by EPA.
- If a Settling Work Defendant appeals EPA's decision
- 8 pursuant to Subpart C of Section XX (Dispute Resolution) and does
- 9 not prevail upon final resolution of the dispute, all accrued
- 10 stipulated penalties; plus interest at the rate specified in 28
- 11 U.S.C. § 1961, shall be paid within thirty (30) days of a final
- 12 court order.
- 13 I.1. In the event that, pursuant to Subpart AA of Section
- 14 VII (Work To Be Performed), EPA assumes performance of all or a
- 15 portion of the Work that Lockheed is required by this Decree to
- 16 perform, Lockheed shall, in lieu of any other penalties that
- 17 might be payable under this Decree, pay a Work Assumption Penalty
- in the amount of one million dollars (\$1,000,000.00). Lockheed
- 19 is not required to pay a Work Assumption Penalty if EPA takes
- 20 over the Work pursuant to Subpart C(2) of Section XVII
- 21 (Reservation and Waiver of Rights).
- 22 2. In the event that, pursuant to Subpart AA of Section VII
- 23 (Work To Be Performed), EPA assumes performance of all or a por-
- 24 tion of the Work that the City is required by this Decree to per-
- 25 form, the City shall, in lieu of any other penalties that might
- 26 be payable under this Decree, pay a Work Assumption Penalty in
- 27 the amount of two hundred and fifty thousand dollars

- 1 (\$250,000.00). The City is not required to pay a Work Assumption
- 2 Penalty if EPA takes over the Work pursuant to Subpart C(2) of
- 3 Section XVII (Reservation and Waiver of Rights).
- 4 3. Payment of the Work Assumption penalties provided for in
- 5 this Subpart H shall be in addition to any stipulated penalties
- 6 which accrued prior to a Settling Work Defendant's receipt of
- 7 EPA's notice of intent to take over all or a portion of the Work.
- 8 Unless waived by EPA, such Work Assumption Penalty shall be pay-
- 9 able within thirty (30) days after a Settling Work Defendant's
- 10 receipt of notice that EPA intends to take over all or a portion
- 11 of the Work. However, if that Settling Work Defendant invokes
- 12 the dispute resolution procedure, payment of its Work Assumption
- 13 Penalty shall be tolled until thirty (30) days after final
- 14 resolution of the dispute; provided, however, that that Settling
- 15 Work Defendant shall not pay any Work Assumption Penalty or,
- 16 pre-assumption penalties related to the issue(s) on which that
- 17 Settling Work Defendant prevails, or interest thereon if it is
- 18 determined that EPA's takeover of the Work of that Settling Work
- 19 Defendant was not permitted pursuant to Subpart Y of Section VII
- 20 (Work to Be Performed).

21 XX. DISPUTE RESOLUTION

- 22 A. As required by Section 121(e) of CERCLA, 42 U.S.C. §
- 23 9621(e), the Settling Parties shall attempt to resolve ex-
- 24 peditiously and informally any disagreements arising under or
- 25 from the implementation of this Decree or any Work required
- 26 hereunder.

- B. If a dispute arises with respect to the meaning or ap-
- 2 plication of this Decree, other than one regarding the amount of
- 3 stipulated penalties due per type of violation, the dispute shall
- 4 in the first instance be the subject of informal good-faith nego-
- 5 tiations between EPA and the appropriate Settling Defendant(s)
- 6 pursuant to Subpart C of this Section. In the event that the
- 7 parties cannot resolve the dispute, the interpretation advanced
- B by EPA shall be considered binding unless a Settling Defendant
- 9 invokes the dispute resolution provisions of Subpart F of this
- 10 Section. The decision to invoke dispute resolution shall not in
- 11 and of itself constitute a force majeure. Settling Defendants
- 12 reserve the right to dispute a determination by EPA that a force
- majeure has not occurred.
- 24 C. If a Settling Defendant has a good-faith objection to a
- 15 decision by EPA with respect to Covered Matters or if a Settling
- 16 Defendant believes that it has otherwise reached an impasse with
- 17 EPA with regard to the requirements or interpretation of this
- 18 Consent Decree, that Settling Defendant shall notify EPA's
- 19 Project Coordinator and EPA's Office of Regional Counsel in writ-
- 20 ing of its position, within fourteen (14) days of receipt of
- 21 EPA's decision or of determining that an impasse has been
- 22 reached. EPA and the Settling Defendant shall then have fourteen
- 23 (14) days from EPA's receipt of the written notice to resolve the
- 24 matter. If possible, the dispute shall be resolved by informal
- 25 telephone conferences. Either EPA or the Settling Defendant may
- 26 also request that the parties meet and confer to try to resolve
- 27 the dispute within the fourteen (14) day period. By the end of

- 1 the foregoing fourteen (14) day period or within seven (7) days
- 2 after the parties meet and confer, whichever is later, EPA shall
- 3 issue a written decision regarding the dispute.
- 4 D. Invocation of the Dispute Resolution procedure, by it-
- 5 self, will not postpone the Work schedule with respect to any
- 6 disputed issue or stay the accrual of stipulated penalties. EPA
- 7 agrees not to demand payment of penalties and interest accrued
- 8 until completion of the Dispute Resolution process.
- 9 E. If a Settling Defendant chooses not to follow EPA's
- 10 decision regarding the dispute, that Settling Defendant may file
- 11 with the Court a petition briefly describing the nature of the
- 12 dispute and its suggested resolution. Such a petition shall not
- 13 be filed before EPA has issued its written determination pursuant
- 14 to Subpart C of this Section and shall not be filed more than
- 15 thirty (30) days after EPA has issued such determination. EPA
- 16 shall have thirty (30) days to respond to the petition.
- 17 F. In any dispute resolution proceeding regarding selec-
- 18 tion of the remedial action, the Court shall uphold EPA's deci-
- 19 sion unless the Settling Defendant can demonstrate on the basis
- 20 of the Administrative Record that EPA's decision was arbitrary
- 21 and capricious or not otherwise in accordance with the law, as
- 22 set forth in CERCLA Section 113(j)(2), 42 U.S.C. § 9613(j)(2).
- 23 In any dispute involving a claim of force majeure, the Settling
- 24 Defendant shall have the burden of proving by a preponderance of
- 25 the evidence that any delay was, is or will be caused by events
- 26 beyond its control and that the duration of any delay requested
- 27 by a Settling Defendant is necessitated by the force majeure. In

- all other disputes, the standard of review shall be determined by
- 2 the Court in accordance with general principles of administrative
- 3 law. In all disputes, the Settling Defendant shall have the bur-
- 4 den of proof. Upon this Court's resolution of the dispute,
- 5 stipulated penalties shall be paid or set aside in accordance
- 6 with Subpart H of Section XIX (Stipulated Penalties). A finding
- 7 that a Settling Defendant has prevailed shall not excuse stipu-
- 8 lated penalties for failure to perform requirements not in dis-
- 9 pute, except to the extent a Settling Defendant can show that it
- 10 was impracticable to perform those requirements pending resolu-
- 11 tion of the dispute. If the Settling Defendant prevails, the
- 12 deadlines for any requirements which Settling Defendants could
- 13 not practicably meet during the dispute resolution proceedings
- 14 shall be extended to account for any delays attributable to such
- 15 proceedings.

16 XXI. FORCE MAJEURE

- 17 A. The Settling Parties agree that time is of the essence
- in the implementation of this Consent Decree. Settling Defen-
- 19 dants shall perform all the requirements of this Consent Decree
- 20 according to the schedules set forth herein or established
- 21 hereunder or any approved modifications thereto unless their per-
- 22 formance is prevented or delayed by events which constitute a
- 23 force majeure.
- 24 B. For the purposes of this Decree, a force majeure is
- 25 defined as any event arising from causes beyond the control of a
- 26 Settling Defendant or its contractors, subcontractors or consult-
- 27 ants, which delays or prevents that Settling Defendant's perfor-

mance notwithstanding that Settling Defendant's best efforts to 1 avoid the delay. This requirement that a Settling Defendant ex-2 3 ercise "best efforts to avoid the delay" includes using best efforts to anticipate any potential force majeure event and to ad-4 5 dress the effects of any force majeure event (1) as it is occur-6 ring and (2) following the force majeurs event, such that any 7 delay is minimized to the greatest extent practicable. Neither 8 economic hardship nor increased costs shall be considered a force 9 majeure. A force majeure may include, but is not limited to, ex-10 traordinary weather events, natural disasters, national emer-11 gencies, failure by the other Settling Work Defendant to perform Work that is necessary for the Settling Work Defendant asserting 12 a force majeure to perform its obligations, delays in obtaining 13 14 access to property not owned or controlled by the Settling Defendant, despite timely, best reasonable efforts to obtain such ac-15 15 cess, and delays in obtaining any required approval or permit from EPA or other governmental entities that result despite the 17 Settling Defendant's submission of all information and documenta-18 tion reasonably required for approval or applications for permits 19 20 (and any supplemental information and documentation that may 21 reasonably be requested) within a time frame that would permit 22 the Work to proceed in accordance with the schedule contained in 23 or established pursuant to this Decree.

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- 1 C. If a Settling Defendant invokes force majeure, it shall
- 2 have the burden of proving by a preponderance of the evidence
- 3 that any delay was, is or will be caused by events beyond its
- 4 control and that the duration of any extension requested is
- 5 necessitated by the force majeure.
- D. In the event of a force majeure, the time for perfor-
- 7 mance of the activity delayed by the force majeure shall be ex-
- 8 tended for the minimum time necessary to allow completion of the
- 9 delayed activity. The time for performance of any activity by
- 10 any Settling Defendant dependent on the delayed activity shall be
- 11 similarly extended. An extension of the time for performance of
- 12 an obligation directly affected by the force majeure event shall
- 13 not, of itself, extend the time for performance of any subsequent
- 14 obligation unless the subsequent obligation is dependent upon the
- obligation directly affected. EPA shall determine whether re-
- 16 quirements are to be delayed and the time period granted for any
- 17 delay. Settling Defendants shall exercise best efforts to avoid
- or minimize any delay and any effects of a delay caused by a
- 19 force majeure.
- 20 E. In the event of a force majeure, any Settling
- 21 Defendant(s) asserting force majeure shall orally notify EPA's
- 22 Project Coordinator or, in his or her absence, the Director of
- 23 the Hazardous Waste Management Division, EPA, Region IX, im-
- 24 mediately (no later than 48 hours after that Settling Defendant
- 25 becomes aware of the force majeure) and shall notify EPA in writ-
- 26 ing within ten (10) calendar days after discovery of the force
- 27 majeure. The written notification shall describe the force

- 1 majeure, the anticipated length of any delay, any measures which
- 2 that Settling Defendant is taking or plans to take to mitigate
- 3 the event or the delay and a schedule for implementation of such
- 4 measures, and a statement as to whether, in the opinion of that
- 5 Settling Defendant, such event may cause or contribute to an en-
- 6 dangerment to public health, welfare, or the environment.
- 7 F. Failure of a Settling Defendant to comply with the
- 8 notification requirements of this Section shall result in forfei-
- 9 ture of its right to claim a force majeure delay.

XXII. CONTRIBUTION PROTECTION

- With regard to claims for contribution against Settling
- 12 Defendants for matters addressed in this Consent Decree, the Set-
- 13 tling Parties agree that Settling Defendants are entitled, as of
- 14 the effective date of this Decree, to such protection from con-
- 15 tribution actions or claims as provided in CERCLA Section
- 16 113(f)(2), 42 U.S.C. § 9613(f)(2); provided, however, that each
- 17 Settling Defendant expressly waives the provisions of CERCLA Sec-
- 18 tion 113(f)(2), 42 U.S.C. § 9613(f)(2), as against any other Set-
- 19 tling Defendant, and reserves its right to pursue any other Set-
- 20 tling Defendant(s) for the cost of response activities related to
- 21 the Site and the City reserves its rights (if any) to pursue any
- 22 other Settling Defendant for any damages to natural resources.

23 XXIII. FORM OF NOTICE

- 24 A. Except insofar as oral notification is specifically
- 25 provided for in this Decree, when notification to or communica-
- 26 tion with the United States Department of Justice, EPA, Lockheed,

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1	Weber or the City is required by the terms of this Consent
2	Decree, it shall be in writing, postage prepaid, and addressed as
3	follows:
4	As to EPA:
5 6	EPA Project Coordinator - Burbank Operable Unit San Fernando Valley Basin Superfund Site Hazardous Waste Management Division
7	Superfund Program, Region IX United States Environmental Protection Agency
8	75 Hawthorne Street San Francisco, CA 94105
9	and
10	Assistant Regional Counsel - Burbank Operable Unit San Fernando Valley Basin Superfund Site
11	Office of Regional Counsel, Regional IX United States Environmental Protection Agency
12	75 Hawthorne Street San Francisco, CA 94105
13	
14	As to the United States Department of Justice:
15	Chief Environmental Enforcement Section Environment and Natural Resources Division
16	United States Department of Justice Ben Franklin Station, P.O. Box 7611
17	Washington, D.C. 20044-7611
18	As to Lockheed:
19	Ron Helgerson Lockheed Engineering and Sciences Company
20	1903 West Empire, Unit 33 Burbank, California 91504
21	As to City:
22	
23	General Manager City of Burbank Public Service Department
24	164 West Magnolia Blvd. Burbank, California 91503-0631
25	and ·
26	

Carolyn Barnes, Esquire
Office of the City Attorney
2 275 East Olive
Burbank, California 91510-6459

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As to Weber:

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George H. Hempstead Weber Aircraft, Inc. 100 Wood Avenue, South Iselin, New Jersey 08830

- B. A Settling Party may change its address for purposes of this Decree by mailing notice of a change of address to the other Settling Parties.
- 10 C. In the case of written notices or submittals, a notice
 11 or submittal shall be deemed to have occurred on the date the
 12 notice or submittal is received by the party to whom notice must
 13 be given or a document must be submitted pursuant to this Decree.

14 XXIV. MODIFICATION

- 15 A. Except as provided in Subpart B of this Section and in
 16 Subpart B of Section XXIII (Form of Notice), there shall be no
 17 modification of this Consent Decree without written approval of
 18 the Settling Parties and entry by the Court.
- 19 The United States and the appropriate Settling Work Defendant(s) may agree to modify the Statement of Work and any 20 documents or deliverables approved by EPA pursuant to this 21 Decree. Any such modification must be in writing and must be 22 signed by EPA and the Settling Work Defendant(s) affected by the 23 modification, and shall be sent to all Settling Defendants within 24 ten days of execution. No such modifications shall change (1) 25 any of the requirements of the body of the Consent Decree (i.e., 26

- 1 the Consent Decree exclusive of those attachments which have been
- 2 incorporated into the Decree by reference), (2) the ROD or (3)
- 3 the ESD.
- 4 XXV. ADMISSIBILITY OF DATA
- 5 In the event that the Court is called upon to resolve a dis-
- 6 pute concerning implementation of this Consent Decree, the Set-
- 7 tling Parties waive any evidentiary objections to the admis-
- 8 sibility into evidence of data gathered, generated, or evaluated
- 9 pursuant to this Decree that has been verified using the quality
- 10 assurance and quality control procedures specified in the Quality
- 11 Assurance Project Plan(s) approved pursuant to this Decree.
- 12 XXVI. EFFECTIVE DATE
- This Consent Decree is effective upon the date of its entry
- 14 by the Court.
- 15 XXVII. <u>COMMUNITY RELATIONS</u>
- The Settling Work Defendants shall cooperate with EPA and
- 17 the State in providing information to the public.
- 18 XXVIII. <u>PUBLIC PARTICIPATION</u>
- 19 A. The United States will publish notice of the
- 20 availability for review and comment of this Consent Decree upon
- 21 its lodging with the United States District Court as a proposed
- 22 settlement in this matter in accordance with CERCLA Section
- 23 122(d)(2)(i), 42 U.S.C. § 9622(d)(2)(i).
- B. The United States will provide persons who are not
- 25 parties to the proposed settlement with the opportunity to file
- 26 written comments during at least a thirty (30) day period follow-
- 27 ing such notice. In addition, EPA intends to hold an informal

- 1 public meeting in Burbank, California during this period to
- 2 receive either written or oral comments. The United States will
- 3 file with the Court a copy of any comments received and its
- 4 responses to such comments.
- 5 C. After the close of the public comment period, the United
- 6 States will review all comments and determine whether the com-
- 7 ments disclose facts or considerations which indicate that the
- 8 proposed Decree is inappropriate, improper or inadequate and that
- 9 it therefore should be modified. No Settling Party shall be
- 10 bound by modifications to this Decree without its prior written
- 11 consent, and consent to this Decree is not consent to such
- 12 modifications.
- 13 XXIX. NOTICE TO THE STATE
- 14 EPA has notified the State of California pursuant to Section
- 15 106(a) of CERCLA, 42 U.S.C. § 9606(a) prior to entry of this
- 16 Decree.
- 17 XXX. CONSISTENCY WITH THE NATIONAL CONTINGENCY PLAN
- 18 The Settling Parties agree, and the Court finds, that the
- 19 Work, if performed in accordance with the requirements of this
- 20 Consent Decree, is consistent with the provisions of the NCP,
- 21 pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605.
- 22 XXXI. <u>INDEMNIFICATION OF THE UNITED STATES</u>
- 23 A.1. Notwithstanding any approvals which may be granted by
- 24 the United States or other governmental entities, Lockheed shall
- 25 indemnify the United States and any of its divisions, depart-
- 26 ments, agents or employees and save and hold the United States,
- 27 any of its divisions, departments, agents or employees harmless